No. 70-36

No. ~~952~~

Supreme Court, U.S.
FILED
NOV 9 1970
E. ROBERT SEAVER, CLERK

In the

Supreme Court of the United States

CHARLES R. PERRY, et al,
Petitioners

vs.

ROBERT P. SINDERMANN,
for himself and for all others similarly situated,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your Petitioners, Charles R. Perry, William L. Pettit, Guy Elliott, James F. Ocker, Betty Dooley, G. Kirk Harding, R. C. Mason, Otto Pavlicek, Joe

C. Zant, all individually and as members of the Board of Regents of Odessa Junior College, and Dr. Jack Rodgers, individually and as president of Odessa Junior College and the Board of Regents of Odessa Junior College, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit which, as the lower court admits, is in conflict with the prior decision of the 10th Circuit in **Jones v. Hopper,** 410 F.2d 1323 (10th Cir., en banc, 1969), cert. denied ..... U.S. ....., 90 S. Ct. 1111, ... L. Ed. 2d ..... (1970).

I.

OPINION OF THE COURT BELOW

The opinion of the Court of Appeals is not yet reported. It is printed in Appendix A hereto.

II.

JURISDICTION

The judgment of the Court of Appeals was entered on August 10, 1970, and is printed in Appendix B hereto. Rehearing was denied on September 9, 1970, and that order is printed in Appendix C hereto. Jurisdiction is invoked under 28 U.S.C., Sec. 1254 (1).

III.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in reversing the judgment of the trial court and in remanding the case for trial, because the pleadings and sum-

mary judgment evidence established that petitioners did not deprive respondent of any right, privilege or immunity secured by the Federal Constitution and laws, and the trial court so held.

2. Whether the Court of Appeals erred in reversing the judgment of the trial court because respondent had no constitutionally protected right to have his teaching contract renewed, had no tenure and had no expectancy to continued employment under the Constitution and Laws of the State of Texas and because the petitioners, in electing not to renew respondent's contract, validly exercised the discretion conferred and imposed upon them by the Constitution and Laws of the State of Texas.

3. Whether the Court of Appeals erred in refusing to follow **Jones v. Hopper, supra,** a case decided on similar facts and allegations and which should control the disposition of this case.

IV.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. First Amendment:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. Fourteenth Amendment:

"Section 1. . . . No state shall make or enforce

any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

3. 42 U.S.C., Sec. 1983:
"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

4. Article VII, Sec. 1, Texas Constitution:
" . . . it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools."

5. Article VII, Sec. 3, Texas Constitution:
" . . . and the Legislature may also provide for the formation of school districts by general laws; . . .".

6. Article 2815h, Sec. 13, Texas Civil Statutes:
"The Board of Trustees of the Junior College shall have the power to select a president, dean or other administrative officer, and, upon his recommendation, to select the faculty and other employees of the college, and to fix the compensation and

manner of payment of such administrative head, faculty and employees . . .".

7. Article 2815h, Sec. 20, Texas Civil Statutes: " . . . Said Board of Trustees shall adopt such rules, regulations and by-laws as they may deem proper, and they shall have exclusive power to manage and govern said Junior College . . .".

8. Article 2815o, Texas Civil Statutes: Changed the Board of Trustees to a Board of Regents and increased members from 7 to 9.

V.

STATEMENT

This suit was brought in the United States District Court for the Western District of Texas, Midland-Odessa Division, by respondent Sindermann against the petitioners, who were the Board of Regents of Odessa Junior College, the individual members of the Board of Regents and the president of the college. Respondent based jurisdiction on 42 U.S.C., Sec. 1983 and 28 U.S.C., Sec. 1343.

Respondent alleged, in effect, that he was a teacher at Odessa Junior College for the school year 1968-1969 and that his contract was not renewed for the succeeding year in order to retaliate against him for his exercise of certain rights guaranteed under the First and Fourteenth Amendments to the Constitution. Respondent sought judgment that the decision of the petitioners not to renew his contract was in violation of his rights, that he be given a formal hearing on the reasons his contract was not renewed,

that he be retained on the faculty for the succeeding school year and for $475,000 in actual and punitive damages. All of the petitioners filed motions for summary judgment. These were granted by the trial court which found that respondent had no cause of action, had no contract, had no right which would require petitioners to execute a contract with respondent or to employ him and that petitioners did not violate any constitutional rights of respondent.

Respondent Sindermann became a member of the faculty of Odessa Junior College in 1965 and by successive one-year contracts remained on the faculty through the 1968-1969 school year. His last one-year contract expired on May 31, 1969, which was the end of the school year. (Plaintiff's First Amended Original Complaint, Par. VI).

Odessa Junior College has no tenure system. No member of the faculty had any formal assurance that their employment would be continued beyond the school year during which they were teaching. This fact was not only known to Mr. Sindermann at the time he entered into his original contract with the college but such fact was affirmatively stated in the Faculty Guide which was in use at the time of the commencement and throughout his employment. (Plaintiff's First Amended Original Complaint, Par. VII; Plaintiff's Appendix "A", at page 3). The renewal of a teacher's yearly contract is discretionary with the president and the Board of Regents under applicable state law as well. Article 2815h, Secs. 13 and 20, Tex. Civ. Stat., set out **supra.**

At one time Mr. Sindermann was made co-chair-

man of the Social Science Department with a $300 per year increase in pay. In the fall of 1968, however, he was dropped as co-chairman because of his addiction to writing lengthy letters to other members of his department and his unwillingness to follow certain administrative procedures. His salary was not reduced. (Pgs. 1-2, Appendix A to Plaintiff's First Amended Original Complaint).

In February of 1969 Mr. Sindermann was elected president of the Texas Junior College Teachers Association. Immediately after his election, contrary to the previous actions of other College faculty members who had held this same position, Mr. Sindermann requested a full time secretary, that he be relieved of a portion of his teaching load and that he be given time off from his classes to visit various other Texas junior colleges. These requests were refused. (Pgs. 2-3, Appendix A to Plaintiff's First Amended Original Complaint).

On April 9, 1969, Mr. Sindermann sent a letter to Professor Sedate, Dean of the Evening College and Chairman of the Social Science Department, requesting permission to be absent from his classes for the purpose of appearing and testifying in Austin, Texas, in connection with certain legislation pending in the Texas legislature. Pursuant to the provisions of the Faculty Guide, the letter was referred to the Dean of the College and then to the President. The request was denied by the President and a letter to this effect was sent to Mr. Sindermann on April 10, 1969. (Plaintiff's Appendix "A", pgs. 4-6).

On the afternoon of April 22, 1969, Mr. Sinder-

mann again requested permission from the President of the college to be absent from his classroom and his teaching duties for the purpose of appearing and testifying at Austin, Texas, in support of certain legislation. This permission was denied by the president of the college, whose decision in such matters is final under the provisions of the Faculty Guide. In spite of the refusal, Mr. Sindermann was absent from his classes on April 23, 1969, and went to Austin to testify in connection with the legislation involved. However, no hearing was held in Austin and he did not testify.

Again, under date of April 25, 1969, Mr. Sindermann, by letter, requested permission from the chairman of his department to be absent from his classes on April 28, 1969, for the purpose of once more going to Austin to testify in support of certain legislation. He was again denied permission to be absent from his classroom duties and this refusal was delivered in writing to his home on April 26, 1969. In spite of this refusal by his superiors, Mr. Sindermann, by letter dated April 27, 1969, advised the chairman of his department that he would be absent anyway on April 28, 1969, and he was so absent from his classes, contrary to the instructions of the administration. (Plaintiff's Appendix "A", pgs. 7 and 8). Respondent affirmatively pleaded in his complaint and it is his position that these absences were "unauthorized" and without "the College Administration's approval". (Plaintiff's First Amended Original Complaint, Par. XII; Appellant's Brief, pg. 32). This was one of the reasons for failing to renew his

contract (Plaintiff's Affidavit in Support of a Motion Opposing Summary Judgment).

Under date of May 19, 1969, the president of Odessa Junior College notified Mr. Sindermann that the Board of Regents had voted to approve the president's recommendation not to renew Mr. Sindermann's contract for 1969-1970. (Appendix F. Plaintiff's Original Complaint). This suit was filed some three days later on May 22, 1969. Until the suit was filed, no request had been made for an administrative hearing. No hearing was held.

Each of the foregoing facts are established without contradiction or dispute by respondent's own pleadings.

VI.

ARGUMENT

Jones v. Hopper, supra, is directly contrary to the opinion of the court below and was so recognized by the court below. In **Jones,** the complainant was an associate professor of philosophy at Southern Colorado State University. He did not have a tenure privilege. Jones was employed under one-year contracts and at the end of his second year, the appellees, who were the president and the board of trustees of the college, determined he would not be rehired for a third year. Jones then filed suit under the Civil Rights Act claiming that he was not rehired because he had exercised his constitutionally protected rights under the first and fourteenth amendments in (a) objecting to the disqualification of an applicant for his department; (b) attacking an

English text book in a student newspaper; (c) founding an independent publication containing articles criticizing the war in Viet Nam, commenting on labor problems and pacifism and objecting to monitored classrooms; and (d) supporting a student in his dispute with the draft board. Jones contended that he had an expectancy of continued employment which was terminated because of the conduct described and that this was an injury to an interest protected by the Civil Rights Act. Jones further contended that the appellees conspired to punish him for exercising his constitutional rights.

The trial court dismissed the complaint for failure to state a claim upon which relief could be granted. This was affirmed on appeal, the Circuit Court holding that Jones was not deprived of any rights, privileges or immunities secured by the Federal Constitution and Laws. The appellate court reasoned first, that Jones had no contract interest which was breached since the contract expired and did not exist, and second, that because of broad powers of management and control conferred on the Board of Trustees by Colorado Law, Jones had no expectancy to continued employment.

This decision should be controlling. First, the complaint in the instant case makes no allegation that a contract existed and seeks no recovery for a breach of contract. Second, the powers conferred by Texas Law upon the Board of Regents and President of Odessa Junior College are no less broad than those of Colorado Law. See Texas statutes cited above. Petitioners are given the power to select the

faculty and exclusive power to manage and govern the junior college. The statutory powers given to the Board, the one-year contract and the lack of tenure all, as clearly as in **Jones,** militate against and deny an expectancy to continued employment. Mr. Sindermann was not deprived of any constitutionally protected right or privilege and the trial court was correct in so holding.

The conflict presented by **Jones** and the opinion of the court below is obvious. It must be reconciled for the guidance of our educational institutions.

The summary judgment evidence establishes that the petitioners, in not rehiring Mr. Sindermann, did not exceed their authority nor abuse the discretion imposed by State Law. Surely, petitioners must retain some control over the makeup of the faculty. The issue in not rehiring and the concern of the administration, as shown by the press release attached as "Exhibit A" to Plaintiff's Amended Complaint, were not that Mr. Sindermann had spoken out or exercised his right of free speech, but that he had in the past caused some inconvenience in his department with lengthy letters, evaded administrative procedures, made unusual demands of the college with respect to his Texas Junior College Teachers Association position and strongly indicated that position was paramount over the teaching function he was employed to perform. This pattern finally culminated in Mr. Sindermann's disregarding his teaching function and the instructions of the college administration in order to lobby, at a time of his own choosing, for legislation in which the Association was interested despite the fact the Association employed

an agent for this very purpose. The petitioners, in the exercise of the discretion imposed upon them by Texas Law, and subject to election by the voters of the Junior College District, had the right to consider the past attitude and conduct of the respondent in determining the makeup of the college faculty and in determining whether or not the best interests of the college and its educational function would be promoted by refusing to rehire petitioner or any other professor. This discretionary power has been exercised in a reasonable, legitimate manner consistent with all constitutional and statutory rights of Mr. Sindermann.

An analogous case is **Beilan v. Board of Education of Philadelphia,** 357 U.S. 399, 2 L.Ed 1414, 78 S. Ct. 1317 (1958). There a teacher refused to tell his immediate supervisor whether or not he had ever been a member of the communist party, and was dismissed on the grounds of incompetency.

Justice Burton, in his opinion for a majority of the Supreme Court, said:

> "The only question before us is whether the Federal Constitution prohibits petitioner's discharge for statutory incompetency 'based on his refusal to answer the superintendent's questions.' "
>
> * * * * *
>
> "By engaging in teaching in the public schools, petitioner did not give up his right to freedom of belief, speech or association. He did, however, undertake obligations of frankness, candor and cooperation in answering inquiries made of him

by his employing Board examining into his fitness to serve it as a public school teacher."

* * * * *

"It (the Board) took care to charge petitioner with incompetency, and not with disloyalty. It found him **insubordinate** and lacking in frankness and candor — it made no finding as to his loyalty."

* * * * *

"In the instant case, the Pennsylvania Supreme Court has held that 'incompetency' includes petitioner's '**deliberate** and **insubordinate** refusal to answer the questions of his administrative superior in a vitally important matter pertaining to his fitness.' 386 Pa., at 91, 125 A.2d, at 331. This interpretation is not inconsistent with the Federal Constitution." (Emphasis added.)

Paraphrasing Justice Burton, we might say that Professor Sindermann, by engaging in teaching at Odessa Junior College, did not give up his right to speak out. He did, however, undertake obligations of candor, discipline and cooperation and his failure to live up to those obligations resulted in the refusal of the Board of Regents to reinstate him.

Respondent's pleadings admit that Odessa Junior College has no tenure system, and that an employee of the college can expect to be employed only so long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors. The **Beilan** case found, as a matter of law, that simply refusing to answer questions of an administrative superior was

deliberate insubordination amounting to incompetency and that discharge on this basis was not violative of any of petitioner's rights under the Constitution of the United States (and this, in a tenure state). Certainly, in the instant case, Sindermann's deliberate course of conduct brings him within the framework of **Beilan.**

In **Bradford v. School District No. 20, Charleston, South Carolina,** 364 F.2d 185 (4th Cir. 1966), the appellant, a teacher in a high school in Charleston, brought a suit in the federal district court, claiming that the School Board violated his due process rights because he was dismissed from his position without notice or opportunity to be heard. Although Bradford based his action on Sections 1981 and 1983 of Title 42, U.S.C., the suit was dismissed with prejudice.

Bradford alleged that he went to a barbershop, was refused service, and was thereafter arrested for being drunk, disorderly, and assaulting an officer. He was tried in Corporation Court, found guilty and appealed his conviction to the county court, where it was still pending. He pleaded he was dismissed from his teaching job because of his alleged misconduct. The trial judge held that the petition failed to state a cause of action. The appellate court stated that the district court had properly treated the motion to dismiss as a motion for summary judgment under Rules 12(b) and (c), and that the motion was supported by allegations in the complaint which showed a valid ground for the school board's action of dismissal.

Circuit Judge Bell stated:

"We think too the court was justified in rejecting the plaintiff's contention that his right to equal protection of the laws was violated by the action of the school Trustees. That the Trustees had the statutory duty and responsibility of supervising the conduct of teachers and of dismissing them in proper cases is conceded. **Adler v. Board of Education,** 342 U.S. 485, 72 S. Ct. 380, 96 L.Ed. 517 (1952); **Garner v. Board of Public Works of City of Los Angeles,** 341, U.S. 716, 71 S. Ct. 909, 95 L.Ed. 1317 (1951). In **Adler** the Court said:

> 'That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted.'

"The Supreme Court has also declared that fitness for teaching depends on a broad range of factors, and that there is no requirement in the Federal Constitution that classroom conduct must be the sole basis for fitness. **Beilan v. Board of Education,** 357 U.S. 399, 78 S. Ct. 1317, 2 L.Ed. 2d 1414 (1968). It is, of course, true that the Board's discretion may not be exercised in an arbitrary and capricious manner, nor may the Board exercise its discretion in a discriminatory manner. **Johnson v. Branch,** 364 F. 2d 177 (4th Cir. 1966); **Franklin v. County School Board of Giles County,** 360 F. 2d 325 (4th Cir. 1966), and cases cited therein. Given the plaintiff's admission that he had been convicted by the Municipal Court of public drunk-

enness and assaulting an officer and that his suspension was 'by reason of his alleged misconduct', his failure to allege or contend that the defendants had in any way colluded or conspired in that conviction or had any knowledge of any impropriety therein, we think the court had before it objective facts shown on the face of the complaint which support the discretionary action of the Board and which combined with his failure to notify the Board of any defense, constituted an insuperable bar to relief. Cf. **Legget v. Montgomery Ward & Co.,** 178 F. 2d 436 (10 Cir. 1949); **Bach v. Quiran,** 5 F.R.D. 34 (D.C.N.Y. 1945).

"We think these facts left no genuine issue of fact to be decided and even giving the plaintiff the benefit of all reasonable doubt, see Wright, Federal Courts, Pg. 387 (1963), the defendants were entitled to the summary judgment which the court granted."

Sindermann, as in **Bradford,** has "given" this court his "admission" that he was uncooperative with the administration and willfully disobedient. The admission leaves "no genuine issue of fact to be decided, and even giving Mr. Sindermann the benefit of all reasonable doubt", petitioners were entitled to their summary judgment. A contrary conclusion would require them to violate their duty under law, and invite the other 100 faculty members to disregard all administrative policy and authority.

The Civil Rights Statutes and the proper administration of public schools must be viewed in proper context. In **Ferrell v. Dallas Independent School**

District, et al, 392 F. 2d 697 (5th Cir. 1968), the school principal refused to enroll male students because they failed to comply with a school regulation banning long hair. The Fifth Circuit affirmed the district court, which had concluded that the school authorities had not acted arbitrarily, capriciously or unreasonably in refusing to admit the students.

Judge Gewin wrote:

"This case brings into focus a sensitive area of the law. Constitutional issues which arise under the Bill of Rights have been before the courts many times. The decided cases clearly demonstrate that each case must be decided in its own particular setting and factual background and within the context of the entire record before the court in determining whether the rule or the action about which complaint is made is arbitrary, capricious, unreasonable or discriminatory. This approach to the problem is clearly demonstrated by the authorities hereinafter cited as well as the following: **Thornhill v. State of Alabama,** 310 U.S. 88, 101, 60 S. Ct. 736, 84 L.Ed. 1093, 1102; **West Virginia State Board of Education v. Barnette,** 319 U.S. 624, 627, 63 S. Ct. 1178, 87 L.Ed. 1628, 1637; **Dennis v. United States,** 341 U.S. 494, 510, 71 S. Ct. 857, 868, 95 L.Ed. 1137, 1153; **Whitney v. People of the State of California,** 274 U. S. 357, 376, 47 S. Ct. 641, 71 L.Ed. 1095, 1106. In **Dennis v. United States,** supra, the Supreme Court approved, as a general rule, the following statement by Chief Judge Learned Hand.

> 'In each case (courts) must ask whether the gravity of the "evil", discounted by its

> improbability, justifies such invasion of free speech as is necessary to avoid the danger.'
>
> "The Constitution does not establish an absolute right to free expression of ideas, though some might disagree. The constitutional right to free exercise of speech, press, assembly, and religion may be infringed by the state if there are compelling reasons to do so.
>
> "The compelling reason for the State infringement with which we deal is obvious. The interest of the state in maintaining an effective and efficient school system is of paramount importance. That which so interferes or hinders the state in providing the best education possible for its people must be eliminated or circumscribed as needed. This is true even when that which is condemned is the exercise of a constitutionally protected right.

Just as in the **Ferrell** case, the Board of Regents was and is compelled by the Constitution of the State of Texas, Article 7, § 1, and the statutes of Texas, to adopt regulations for an efficient and effective system and to manage and govern the school consistent with such laws and Constitution. It has done nothing inconsistent with these state requirements nor to unconstitutionally infringe on Sindermann's rights in refusing to renew his contract. The Board has properly exercised its discretionary powers.

Contrary to what the opinion of the lower court seems to recognize, respondent has no absolute right to absent himself from and neglect his school classes for the purpose of attending a committee hearing

at a location over 300 miles away, particularly when the proposed legislation which allegedly prompted the absence was not brought before the legislative committee. The import of the opinion is contrary to **Bomar v. Keyes,** 162 F. 2d 136 (2d Cir. 1947), where the court stated at Pg. 139:

> "We do not mean to suggest that a teacher may absent herself from work indefinitely and serve on a jury without regard to her duty; i.e., that she may choose her own time or stay away as long as she pleases."

If there exists valid reasons for refusing to rehire Mr. Sindermann, i.e., his past attitude and conduct, then the parallel existence of invalid reasons, such as newspaper criticism of the administration, would not render nugatory the valid reasons — notwithstanding Sindermann's claim that the invalid reason was the **sole** cause of not being rehired. The valid reasons for not rehiring Mr. Sindermann cannot be erased by his own acts in other activities. If so, the most guilty could profit by simply engaging in offensive (but constitutionally guaranteed rights) and claiming the latter provoked the difficulty, and the former is thereby rendered immaterial.

It would be a severe handicap to colleges and the continued development of independent thought if the courts assumed the control and direction of the colleges, particularly in the selection of the faculty. The resulting problems to the schools and the courts might well be overwhelming. Respondent, through his past actions, has made himself patently unacceptable to the administration of an orderly, effective

college system. The petitioners concluded, in the exercise of a reasonable and sensible judgment, that it would not be in the best interest of the college to make a new contract with Mr. Sindermann. This action was based on adequate and sufficient, even compelling reason, and should be affirmed by this court. There is really no fact issue for determination, whether such hearing is before the trial court, a faculty committee or some other body. Respondent's own pleadings establish valid reasons for not granting him a new contract. The petitioners have not deprived respondent of any right or privilege secured by the Federal Constitution and Laws.

CONCLUSION

This Petition for Writ of Certiorari should be granted to the end that on review the Circuit Court of Appeals may be directed to reverse its judgment and the judgment of the trial court affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Three true and correct copies of the foregoing Petition for Cretiorari have been furnished counsel for Respondent, Mr. Warren Burnett, Post Office Box 3707, Odessa, Texas, 79760, by placing the same in the United States Mail, postage paid, Certified Mail, Return Receipt Requested, on this the 5th day of November, 1970.

W. O. Shafer

W. O. SHAFER,
Attorney for Petitioners

APPENDIX A

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 28372

ROBERT P. SINDERMANN, for himself and others similarly situated,
Plaintiff-Appellant,

versus

CHARLES R. PERRY, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

---

(August 10, 1970)

Before WISDOM, AINSWORTH and CLARK, Circuit Judges

CLARK, Circuit Judge: The court below disposed of this case by summary judgment but because we find that this case presents issues of constitutional law, the longest way around now proves to be the

shortest way through the thicket. The Board of Regents of Odessa Junior College voted not to renew the employment contract of Professor Robert P. Sindermann. Sindermann filed suit in the district court alleging that the action of the Regents in refusing to offer him a new term of employment was based solely on his exercise of First and Fourteenth Amendment rights of expression, association and petition and alleging violations of due process in connection with this refusal. Finding the contract rights of the parties clear, the court granted a motion of defendants for summary judgment. Shortly after the summary judgment was appealed, this court decided **Pred v. Bd. of Public Instruction,** 415 F.2d 851 (5th Cir. 1969), which classifies the rights of persons circumstanced such as plaintiff as constitutional rather than contractual. **Pred** aligned this court with the 4th Circuit[1] and against the 10th Circuit[2] in this as yet unresolved conflict between circuits. This new development in decisional law, coming as it did after the decision of the court below, renders that court's summary judgment inappropriate and erroneous. We reverse for further development of the facts.

BACKGROUND:

Professor Sindermann became a member of the Odessa College faculty in September 1965, after previous college teaching experience. By a succession of one-year contracts he remained a faculty member until the end of the 1968-69 school year. On May 19, 1969 the college president notified Sindermann that

[1]Johnson v. Branch, 364 F.2d 177 (4th Cir. en banc, 1966), *cert. denied* 385 U.S. 1003, 87 S.Ct. 706, 17 L.Ed.2d 542 (1967).

[2]Jones v. Hopper, 410 F.2d 1323 (10th Cir. en banc, 1969), *cert. denied* ____ U.S. ____, 90 S.Ct. 1111, ____ L.Ed.2d ____ (1970)

the Regents had voted to approve the president's recommendation not to renew his contract for 1969-70. Sixteen days later Sindermann filed the present action and contemporaneously with the instigation of litigation, requested that he be given a hearing by college authorities. Apparently no such hearing has been afforded.

During the 1969-70 school term no member of the Odessa College faculty had any formal assurance of continuation of employment beyond the present school term.[3]

Shortly before official notice of the decision not to renew plaintiff's contract, the college issued an 11-page press release documenting the deterioration of its relationship with plaintiff. The highlights are reflected in this chronology from that document. The validity of Professor Sindermann's work with Odessa College was recognized by his nomination to be co-chairman of the Social Science Department with an increase in pay. As soon as he became co-chairman, he began to circularize lengthy letters to the members of his department. This resulted in his being dropped as co-chairman in the Fall of 1968 but with no corresponding reduction in salary. In February 1969 Sindermann was elected president of the Texas Jun-

[3]The official Faculty Guide published by the college contained the following paragraph:

> "*Teacher Tenure:* Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work."

ior College Teachers Association.[4] Sindermann accepted this office without consultation with any administrative officer of Odessa College and immediately requested student clerical help, a reduction in teaching load and time off during winter months to visit other junior colleges, which had not been true with former faculty members who served in this same office. Sindermann also aligned himself with a group known as "The Committee to Elevate Odessa College", a group seeking to raise Odessa College to a 4-year status — a move officially opposed by the Board of Regents. Plaintiff's name appeared as sponsoring a newspaper advertisement ridiculing the position taken by the Board of Regents on Odessa College's 4-year status.[5]

On at least four occasions Sindermann requested permission from college officials to absent himself from the campus and his teaching duties in order to testify before committees of the Texas legislature on a bill relating to academic freedom and tenure. These requests were each refused but Professor Sindermann nevertheless attended the committee hearings. The press release concluded by quoting a telegram from Sindermann to a Senator which, in part, stated: "I have been fired from Odessa College for attempting to testify on S.B. 512." It noted however that Sindermann had not been officially advised that his con-

[4]The Faculty Guide indicated complete administration approval of this organization in the following language:

> *"Professional Memberships:* Odessa College faculty members pride themselves on one hundred percent membership each year in the Texas State Teachers Association and Texas Junior College Teachers Association."

[5]Sindermann disclaimed any connection with the advertisement but the press release held that his "guilt by association" could not be rejected because he allied himself with the Committee to Elevate Odessa College.

tract would not be renewed. The letter of "official" notification of non-renewal shortly followed the press release.

PLEADINGS AND PROCEEDINGS:

Sindermann's complaint alleged that his contract was not renewed in order to retaliate against him for expressions of opinion, that he was a competent classroom teacher, that he had not been offered an impartial hearing in connection with the non-renewal of his contract, that the action taken against him had a chilling effect on other professors at Odessa College, and that he had been damaged in his professional reputation and standing. He sought compensatory and punitive damages and attorneys fees, a declaratory judgment adjudicating that the Regents' action violated his constitutional rights and that he was entitled to a hearing under suggested procedural guidelines, and a mandatory injunction requiring his reinstatement for the 1969-70 college year at the same level of responsibility and function he had previously held. He named as defendants the members of the Board of Regents and the college president, individually and in their official capacity. The Board of Regents moved to dismiss the action insofar as they were sued in their official capacity. All defendants moved for summary judgment.

Only three affidavits were filed in the course of the pleadings. All were by the plaintiff, Sindermann. The first supported his motion for injunction, the second opposed summary judgment, the third verified the authenticity of the exhibits to his complaint. After

denying the motion to dismiss,[6] the court granted defendants' motion for summary judgment on the basis of the findings and conclusions set out in the margin.[7]

SUMMARY JUDGMENT:

Pred v. Bd. of Public Instruction, supra, invalidates the basic legal premise of the Court's summary judgment. There we said:

> 'Equally unpersuasive is the related argument that since there is no constitutional right to public employment, school officials only allowed these teachers' contracts to expire, and thus they cannot be liable for a violation of any rights protected by § 1983. But in the posture of this case this misconceives the whole thrust of their claim. The right sought to be vindicated is not a contractural one, nor could it be since no **right** to reemployment existed. What is at stake is the vindication of constitutional rights — the right not to be punished by the State or to suffer retaliation at its hand because a public

[6]This action was correct. Harkless v. Sweeny Independent School District, ____ F.2d ____ (5th Cir. 1970) (No. 28188, June 2, 1970).

[7]*Findings:*

"I. Plaintiff's tenure of employment ended May 31, 1969.
"II. Odessa Junior College has no tenure system which fact was known to the Plaintiff at the time he entered into his original contract with the college.
"III. After the termination of his contract of employment the Defendant college owed no obligation to the Plaintiff."

Conclusions:

"I. Plaintiff has no cause of action against the Defendants since his contract of employment terminated May 31, 1969, and Odessa Junior College has not adopted the tenure system.
"II. Plaintiff has no contract with the Defendant college.
"III. Plaintiff has no right which would require Defendants to execute a contract with Plaintiff, or to employ Plaintiff.
"IV. Defendants have not violated any constitutional rights of the Plaintiff."

employee persists in the exercise of First Amendment rights." (415 F.2d at 856).

See also Orr v. Thorpe, ... F.2d ..... (5th Cir. 1970) (No. 27674, June 10, 1970).

In a legally analogous situation, the Supreme Court has made it clear that even the broad discretion vested in a State government to fix municipal boundaries cannot be used as an instrument to circumvent constitutionally protected rights and that where constitutional wrongs are perpetrated in the guise of fixing city limits, the breadth of the legislative power being exercised provides no insulation from judicial correction. **Gomillion v. Lightfoot,** 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960).

The controlling effect of **Pred** is in nowise lessened by the circumstances in the case at bar that Sindermann requested permission to be absent from his teaching duties to exercise constitutional rights, that such permission was refused and that he deliberately disobeyed administrative directions. The inquiry still comes back to be whether the college refused to renew the teaching contract on an impermissible basis — as a reprisal for the exercise of constitutionally protected rights. We reject the sophistry which would recognize that the college could not withhold renewal of Sindermann's contract because of his association with the Committee to Elevate Odessa College or because of his exercise of a reasonable right to petition the legislature by attending committee hearings but, at the same time, recognize a right in the college administration to direct him not to exercise these rights then refuse to renew his contract for disobedience of

their orders. **Compare Sheldon v. Tucker,** 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960).

However, a valid distinction might be drawn between a dismissal on bare bones pleadings as was involved in **Pred,** and a disposition on summary judgment as in the case sub judice. This Court has affirmed the use of summary judgment to dispose of constitutional issues, **Hawthorne v. United States,** 115 F.2d 805 (5th Cir. 1940), see also **Dawkins v. Green,** 285 F.2d 772 (N.D. Fla. 1968), but this form of disposition is often inappropriate in cases involving issues of far-flung import. **Compare Hall v. Garson,** ..... F.2d ..... (5th Cir. 1970) (No. 29690, July 22, 1970) Part II B; **Kennedy v. Silas Mason Co.,** 334 U.S. 249, 68 S.Ct. 1031, 92 L.Ed. 1347 (1948); and **Dispatch, Inc. v. City of Erie,** 364 F.2d 539 (3rd Cir. 1966). It was totally inappropriate in the case at bar, where the only affidavits on which summary judgment was based were submitted by the plaintiff and where there was a clear offer to prove facts constituting a constitutional claim. **Whitaker v. Coleman,** 115 F.2d 305 (5th Cir. 1940). Summary judgment should be granted only when the truth is clear, where the basic facts are undisputed and the parties are not in disagreement regarding material factual inferences that may be properly drawn from such facts. **Cole v. Chevron Chemical Co.,** ..... F.2d ..... (5th Cir. 1970) (No. 29032, June 10, 1970). While there was no dispute about the facts underlying Sindermann's contract status with Odessa College, the truth of his constitutional position was far from clear. The basic facts, as well as the material inferences to be drawn therefrom, were in total dispute. Summary

judgment was improper. We explicitly note that we deal only with procedures and not with the merits. The remand for factual explication is made with no intimation whatsoever as to what outcome such further development should produce.

ACADEMIC HEARING PROCEDURES:

Since the case must be remanded, it is appropriate that we comment on plaintiff's contention that the college denied him procedural due process by simply announcing that he would not be rehired and failing or refusing to give him a hearing.

Before specifying what procedural devices ought to be available to Professor Sindermann at the collegiate level, a determination must be made as to whether the teacher involved has tenure or an expectancy of re-employment under the policies and practices of the institution. **See Ferguson v. Thomas,** F.2d (5th Cir. 1970) (No. 28227, June 23, 1970) and **Greene v. Howard University,** 412 F.2d 1128 (D.C. Cir. 1969). The factual development of the record in its present posture is too scanty for this court to decide whether this second alternative applies to Sindermann.[8] After the facts are developed, if the trial court should conclude that Sindermann did have an expectancy of reemployment,

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[8]The "Teacher Tenure" statement, supra n. 3, creates at least some doubt in this court's mind as to whether this institution might have failed in its apparent attempt to secure the best of both worlds — attracting teachers who think they will be free from annual reemployment pressures, while at the same time retaining broad discretion to make or refuse a new contract each year. The Faculty Guide also sets out "Criteria for Retention of Teaching Personnel" which add to the uncertainty.

then the applicable notice and hearing standards are now established in **Ferguson.**

On the other hand, if the court resolves that Sindermann did not have an expectancy of reemployment which would require the college to show cause for the decision not to renew his contract, a different procedure would be indicated. In such a situation, upon receipt of notice that a new contract will not be offered, the teacher must bear the burden both of initiating the proceedings and of proving that a wrong has been done by the collegiate action in not rehiring him. It is incumbent upon such a teacher, not the college, to shoulder these responsibilities because the college may base its decision not to reemploy a teacher without tenure or a contractual expectancy of reemployment upon any reason or upon no reason at all. **Bomar v. Keyes,** 162 F.2d 136 (2nd Cir. 1947). **Cf. Smith v. Board of Regents,** ..... F.2d ..... (5th Cir. 1970) (No. 28159, May 26, 1970).

A requirement such as plaintiff suggests, that a college must always assign a cause for not renewing the contract of any teacher on its staff, would have the legal effect of improperly denying to colleges freedom of contract to employ personnel on a probationary basis or under annual contracts which are unfettered by any reemployment obligation. Every teacher would thus be granted substantial tenure rights by court edict. Courts do not make contracts for colleges or teachers any more than for any other litigants.

Upon receipt of the college's notice that it will not renew his contract, if a teacher determines to assert that such non-renewal is really a form of punishment

for his exercise of constitutional rights or otherwise constitutes some actionable wrong, the teacher should notify the institution with reasonable promptness of his claim in sufficient detail to fairly enable the institution to show any error that may exist and request a hearing. Upon the receipt of this notice and request the institution should constitute a tribunal to conduct such a hearing that both possesses some academic expertise and has an apparent impartiality toward the charges.

This hearing must include the right to produce witnesses and evidence and the right to confront and cross-examine witnesses produced by the opposition.[9] Of course the whole point of the academic process is lost unless the hearing affords a meaningful opportunity to develop a record which can, if necessary, later form a substantial part of any court proceeding — a transcript which should demonstrate that the academic tribunal based its decision upon matters adduced before it. This is not so just to accommodate court procedures. More importantly, it is the process best calculated to reach a fair accord and to settle the problems which have arisen between the parties. After all, the candid settlement of differences that arise between men is the essence of civil justice for which we strive.

It has been indicated to this court that the college administration was served with this court's subpoena

[9]In Mack v. Florida State Board of Dentistry, ____ F.2d ____ (5th Cir. 1970) (No. 28085, July 7, 1970), we noted that while administrative hearings are not to be conducted with the formalities and strictures of a court trial, they should not be allowed to degenerate into an ungoverned confrontation. The virtues of having a presiding officer with legal training if the parties are represented by counsel, is equally apropos here.

before it received any request for a hearing from Professor Sindermann. If this be correct, then he may have "jumped the gun" in filing the present litigation. School-constituted review bodies are the most appropriate forums for initially determining issues of this type, both for the convenience of the parties and in order to bring academic expertise to bear in resolving the nice issues of administrative discipline, teacher competence and school policy, which so frequently must be balanced in reaching a proper determination.

Except in cases where the teacher or the institution refuses to follow these suggested procedures or the positions of the parties are such as to demonstrate that following such procedures would be a needless waste of time (a finding which the trial court may, on remand, deem appropriate in this case), a court whose jurisdiction is invoked ordinarily should stay its hand until the matter has been made ripe for court adjudication by allowing such procedures to function. [10] If at the conclusion of the academic processes the matter must still come before the court for review, the presentation there arrives buttressed with the record developed before the academic agency, which is entitled to great weight.

CONCLUSION:

This action was brought as a class action on behalf of Professor Sindermann and "on behalf of many of the Odessa Junior College faculty members too numerous to join herein, who have been intimidated and

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[10] See *Ferguson*, supra, and Stevenson v. Board of Education, ____ F.2d ____ (5th Cir. 1970) (No. 28875, May 26, 1970).

harassed by the Defendants, or their agents, for expressing their opinions, and on behalf of many Odessa Junior College faculty members too numerous to join herein, who have become fearful and reluctant to express their opinions because of the conduct of the Defendants as described herein." However, no party before this Court has raised the propriety or impropriety of the class action aspects of this suit under Rule 23, Fed. R. Civ. P. See C. Wright, Federal Courts, § 72, pp. 306-317 (2d ed. 1970); also **Carpenter v. Davis,** ..... F.2d ..... (5th Cir. 1970) (No. 27686, April 9, 1970) and **Eisen v. Carlisle & Jacquelin,** 391 F.2d 555 (2nd Cir. 1968). We therefore make no adjudication whatever on this question.

The summary judgment is reversed and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

APPENDIX B

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1969

No. 28372

D. C. Docket No. P-69-CA-54

ROBERT P. SINDERMANN, for himself and others similarly situated,
Plaintiff-Appellant,

versus

CHARLES R. PERRY, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

Before WISDOM, AINSWORTH and CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court

for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings consistent with the opinion of this Court.

It is further ordered that defendants-appellees pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

August 10, 1970

Issued As Mandate:

APPENDIX C

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 28372

ROBERT P. SINDERMANN, for himself and others similarly situated,
Plaintiff-Appellant,

versus

CHARLES R. PERRY, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

(September 9, 1970)

ON PETITION FOR REHEARING

Before WISDOM, AINSWORTH and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.